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No. 87-182

In the Supreme Court of the United States

October Term 1987

ALOE COAL COMPANY AND
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

vs.

CLARK EQUIPMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of Respondent

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is the petitioners' argument moot?

2. Did the Court of Appeals apply the Erie Doctrine?

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. Plaintiffs' Petition for Certiorari is moot 3

II. The Court of Appeals applied the Erie Doctrine to the issue in question 4

CONCLUSION 9

TABLE OF AUTHORITIES

CASES CITED:

Page

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 7

Cornell Drilling Co. v. Ford Motor Co., 241 Pa. Super. 129, 359 A.2d 822 (1976) 4

East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) 8

Fireman's Fund American Insurance Co. v. Burns Electric Security Services, 93 Ill. App. 3d 298, 417 N.E. 2d 131 (1981) 6

Industrial Uniform Rental Co. v. International Harvester Co., 317 Pa. Super. 65, 463 A.2d 1085 (1983) 4

Johnson v. General Motors Corp., 349 Pa. Super. 147, 502 A.2d 1317 (1986) 5

King v. Order of Travelers, 333 U.S. 153 (1948) 7

Lobianco v. Property Protection, Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981) 5

MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969) 4

McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980) 7

National Surety Corp. v. Midland Bank, 551 F.2d 21 (3d Cir. 1977) 7

Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) 7

Page

Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) 5

Stoner v. New York Life Insurance Company, 311 U.S. 464 (1940) 7

Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 152 (Minn. 1981) 5

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) 5

COUNTER STATEMENT OF THE CASE

At trial plaintiffs proceeded on two theories, negligence and strict liability. The trial judge ruled that plaintiffs did not prove the existence of a defect in the product and granted defendant's motion for a directed verdict on the issue of strict liability. Plaintiffs did not appeal from this ruling.

The negligence issue went to the jury which found Clark to be 65 percent negligent and plaintiff to be 35 percent negligent.

Petitioner's statement does not reveal that Clark's appeal to the Third Circuit raised, inter alia, the improper admission into evidence of opinion testimony of an expert not qualified to give such testimony. Absent such testimony, the plaintiff presented insufficient evidence of causation of the fire and resulting damages. The Court of Appeals ruled in Respondent's favor on the issue of lack of qualification of plaintiff's sole witness as to causation and found that there was not sufficient proof of causation to allow Aloe's negligence claim to go to the jury. This finding was unanimous. On this basis, the Court of Appeals remanded to the District Court for entry of judgment for defendant. Petitioner has not challenged this ruling.

The Court of Appeals also found that plaintiffs had no cause of action in tort because plaintiffs' claim against the seller of the product, was limited to damage which the product caused to itself.

The Court of Appeals denied plaintiffs' Motion for Rehearing Before the Court En Banc.

SUMMARY OF ARGUMENT

This issue asserted in plaintiffs' petition is moot. Even if petitioners were correct, the ruling below is supported by the Court of Appeals' determination of an independent issue (insufficiency of evidence as to causation), which determination is not challenged by plaintiffs' petition.

Petitioners are incorrect in their assertion that the Court of Appeals did not apply Pennsylvania law with regard to the non-existence of a tort remedy for economic loss sustained by the commercial buyer of an allegedly defective product. No Pennsylvania Court has allowed a tort recovery in such situations. The indicators are that the Pennsylvania courts would not allow tort recovery in such situations. These indicators are the holdings and dicta in Supreme and Superior Court decisions and the Superior Court's express approval of majority law which denies tort recovery in such situations. The Court of Appeals' application of Pennsylvania law is presumptively correct.

I. PLAINTIFFS' PETITION FOR CERTIORARI IS MOOT

The Court of Appeals "determined that Aloe did not present sufficient evidence of causation to submit its negligence claim to the jury." (opinion of the Court of Appeals; Appendix A to Plaintiff's Petition for Certiorari 2la; see entire discussion of issue by Court of Appeals 6a to 13a). Accordingly, it remanded with directions to enter judgment for Clark. The court's determination of insufficient evidence of causation is quite independent of the purported Tenth Amendment issues raised by Plaintiff's Petition for Certiorari and is not challenged by plaintiff's petition. The issue asserted in plaintiff's petition is therefore moot.

II. THE COURT OF APPEALS APPLIED THE ERIE DOCTRINE TO THE ISSUE IN QUESTION

The case is in federal court because of diversity of citizenship. The parties and the Court of Appeals are in agreement that under the *Erie* doctrine the substantive law of Pennsylvania applies. The court states "Because our jurisdiction in this case is founded on diversity of citizenship, we are bound to apply Pennsylvania law to the present controversy." (Petition for Certiorari 16a). The Court goes on to cite the guidelines for forecasting state law.

The case involves the commercial buyer[1] and seller of industrial equipment which allegedly injured iteself because it was defective. The suit is in tort. The issue is whether under Pennsylvania law the commercial buyer of industrial equipment has a remedy under tort law when alleged defects in the product cause it to injure itself, or whether the buyer is limited to its contractual remedies under the U.C.C.

The Court of Appeals held that under Pennsylvania law no cause of action in tort exists.

The decision is not inconsistent with any holding of the highest or intermediate court of Pennsylvania.[2] It is consistent with holdings and dicta of both courts. *Industrial Uniform Rental v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983) was a tort action brought by a commercial buyer against a commercial seller of trucks with regard to defects which caused "cracks and failures in the frames" (463 A.2d at 1086). The holding is:

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[1]Actually the subrograting insurance company of the buyer.

[2]*MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 257 A.2d 676 (1969) was a warranty action arising out of a consumer transaction. In *Cornell Drilling Company v. Ford Motor Co.*, 241 Pa. Super. 129, 359 A.2d 822 (1976) the issue was not raised or considered.

no cause of action in tort; suit dismissed. In so holding, the Pennsylvania Superior court expressly approved the majority view of *Seely v. White Motor*, 463 A.2d at 1089. Notably, it approved *Superwood Corp. v. Siempelkamp*, 311 N.W.2d 159, (Minn. 1981) which held:

> Ecomonic losses that airse out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort-theories of negligence or strict liability. (463 A.2d at 1093).

In a subsequent suit by a disappointed buyer of an automobile, the Superior Court likewise held that no action in tort was stated; *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986). That suit involved a consumer transaction, which mars its precedential value as to the instant case.

The Court of Appeals' assessment of Pennsylvania law is in accord with the concurring opinion of the late Chief Justice Eagan of the Pennsylvania Supreme Court in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966):

> I am in complete accord with the court's action in adopting, as the law of Pennsylvania in tort actions involving products liability, Section 402A of the new Restatement of Torts. However, I would specifically restrict its application to those instances wherein physical harm to a user, or ultimate consumer, or to such individual's property is concerned. In cases involving "economic loss", I believe the warranty provision of the sales law, as set forth in the Uniform Commercial Code, present more appropriate standards (220 A.2d at 855).

It is consistent with the decision of the Pennsylvania Superior Court's decision in *Lobianco v. Property Protection,*

Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981), and most notably with Judge Brosky's concurring opinion quoting the Illinois Supreme Court's decision in *Fireman's Fund American Insurance Companies v. Burns Electronic Security Services*, 93 Ill. App. 3d 298, 417 N.E. 2d 131 (1981):

> When goods are sold, their soundness is the core of the bargain. It is for the parties to decide what the consequences will be if the bargain founders. An entire body of law, contracts—of which product warranties is a part—is available to govern those areas of the relationship concerning which the bargain is silent. There is thus no need for the law of torts to define the right of parties in privity when they have done so themselves. When a buyer loses the benefit of his bargain because the goods are defective, that is, when he suffers economic loss, he has his contract to look to for remedies. *Tort law need not, and should not enter the picture.* (447 A.2d at 427, emphasis supplied).

Petitioners' thesis is that the Court of Appeals is bound to apply the dicta which petitioners glean from a few opinions, such as a footnote in *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848, 854 N.7. *Kassab was not a tort action.* It was a warranty action filed by Mr. and Mrs. Kassab, family farmers; the sole issue was whether privity of contract was a necessary element of a warranty action with regard to some feed which adversely affected a bull. The language relied on is in dicta in a footnote in which the court is discussing a hypothetical consumer action under 402A of the Restatement of Torts, i.e. a defective stove in a kitchen. It is in no way applicable to the existence of a tort claim for a commercial buyer.

In *Industrial Uniform* (supra, 463 A.2d 1085) there is dicta consistent with the Court of Appeals' earlier decision

in *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d cir. 1981), but the issues before the court were not identical and the Pennsylvania Superior Court was not called upon to resolve that precise issue. The *Erie* doctrine does not require a Court of Appeals to apply without question even the holdings of intermediate courts, much less the dicta; *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), *King v. Order of Travelers*, 330 U.S. 153, 160-61 (1948). Not even the dicta of the highest court is absolutely controlling; *National Surety Corp. v. Midland Bank*, 551 F.2d 21 (3d Cir. 1977); *McKenna v. Ortho Pharmaceutical Corp.*, 662 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). It is the law that in diversity cases, federal courts must follow the decisions (not dicta) of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently, and that is particularly true where the intermediate court has determined the precise question in issue in an earlier suit between the same parties and the highest court of the state has refused review; *Stoner v. New York Life Insurance Company*, 311 U.S. 464 (1940), but those circumstances are not present here. The cases relied on by petitioner do not state differently. Most of the *Erie* cases cited by petitioner involve specific issues remote from the issue here, such as whether the *Erie* doctrine applies to equitable relief, application of a federal arbitration statute, differentiating procederal issues from substantive issues, etc.

The Pennsylvania Superior Court in *Industrial Uniform*, in denying a tort recovery to the commercial buyer, noted the *Pennsylvania Glass Sand* decision with respect, but was not called upon to adopt it or reject it and so did neither. It cannot be assumed from the Superior Court's reference to *Pennsylvania Glass Sand* that the Superior

Court, much less the Pennsylvania Supreme Court, would follow it when that precise issue comes before it. It is well known that state courts, especially in issues of first impression, look for guidance to decisions of federal courts, as well as the decisions of courts of sister states. These decisions are not binding, but the reasoning is helpful. The value of *Pennsylvania Glass Sand* as a guide for the Pennsylvania courts has been largely destroyed by the thorough, cogent, scholarly analysis of the U.S. Supreme Court in *East River Steamship Company v. Transamerica Delaval, Inc.* 476 U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), which, although not binding, is more likely to be followed than *Pennsylvania Glass Sand.* We cannot assume that the Pennsylvania appellate courts would reject the reasoning of the highest court in the land. We cannot assume that the Pennsylvania appellate courts would reject the majority view of its sister states, as reported in *East River Steamship.*

The Court of Appeals has followed the *Erie* guidelines in predicting what the Pennsylvania courts would do with the issue. Its decision does not conflict with any holding of any Pennsylvania court. The decision is in accord with prior Pennsylvania pronouncements, majority law, and the scholarly, unanimous decision of the highest court in the land. There is no reason to disturb its ruling.

CONCLUSION

The Petition For Certiorari should be denied.

Respectfully submitted,

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